Guideline Sentencing Update

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Offense Conduct

Calculating Weight of Drugs

Supreme Court reaffirms *Chapman,* holds that LSD carrier medium is included in weight calculation for mandatory minimum. In *Chapman v. U.S.*, 500 U.S. 453, 468 (1991), the Supreme Court held that the weight of the carrier medium is included when determining the weight of LSD for mandatory minimum sentences under 21 U.S.C. §841(b)(1). After *Chapman*, the Guidelines were amended to provide a new method of establishing the weight of LSD based on the number of doses and an assigned weight per dose, rather than using the actual weight of whatever carrier medium was used. *See* §2D1.1(c)(H) & comment. (n.16) (formerly n.18, effective Nov. 1, 1993). Petitioner in this case was originally sentenced to 192 months before the Guidelines were amended and was subject to a mandatory 10-year minimum term because the combined weight of the LSD and blotter paper exceeded 10 grams. After the amendment was made retroactive, he petitioned for resentencing under the new guideline method and argued that this method should also be used for the §841(b)(1) calculation. His guideline range was reduced to 70–87 months (based on 4.58 grams of LSD under the new method), but the district court held that *Chapman* still applied for the mandatory minimum and sentenced petitioner to 10 years. The Seventh Circuit affirmed. *See U.S. v. Neal,* 46 F.3d 1405, 1408–11 (7th Cir. 1995) (en banc).

The Supreme Court unanimously affirmed. "While acknowledging that the [Sentencing] Commission's expertise and the design of the Guidelines may be of potential weight and relevance in other contexts, we conclude that the Commission's choice of an alternative methodology for weighing LSD does not alter our interpretation of the statute in *Chapman*. In any event, principles of stare decisis require that we adhere to our earlier decision. . . . Entrusted within its sphere to make policy judgments, the Commission may abandon its old methods in favor of what it has deemed a more desirable 'approach' to calculating LSD quantities . . . . We, however, do not have the same latitude to forsake prior interpretations of a statute. True, there may be little in logic to defend the statute's treatment of LSD; it results in significant disparity of punishment meted out to LSD offenders relative to other narcotics traffickers. . . . Even so, Congress, not this Court, has the responsibility for revising its statutes. . . . We hold that §841(b)(1) directs a sentencing court to take into account the actual weight of the blotter paper with its absorbed LSD, even though the Sentencing Guidelines require a different method of calculating the weight of an LSD mixture or substance."

Neal v. U.S., No. 94-9088 (U.S. Jan. 22, 1996) (Kennedy, J.).

See *Outline* at II.B.1.

Possession of Weapon by Drug Defendant

Ninth Circuit holds that §2D1.1(b)(1) enhancement cannot be given to defendant acquitted on §924(c) charge. Defendant was convicted of a drug offense but acquitted on a charge of using or carrying a firearm in relation to that offense, 18 U.S.C. §924(c). At sentencing, he received the §2D1.1(b)(1) enhancement for possessing a weapon during a drug offense. He appealed, arguing that acquittal on a §924(c) charge precludes application of §2D1.1(b)(1), a claim rejected by all circuits that have considered the issue. See cases in *Outline* at section II.C.4.

However, the appellate court agreed with defendant and reversed, reasoning that in *U.S. v. Brady*, 928 F.3d 844, 851 (9th Cir. 1991), it had held that "a district court sentencing a criminal defendant for the offense of conviction cannot reconsider facts that the jury necessarily rejected by its acquittal of the defendant on another count." The court rejected the government's argument that "the district court's determination that Watts possessed a firearm is not a reconsideration of facts rejected by the jury, because the jury could have acquitted Watts on the section 924(c) charge because it believed that Watts possessed a firearm during the offense but that the firearm was not connected to the offense. . . . The connection of a firearm to the offense of conviction, although not an *element* of the weapon enhancement under the Guidelines, is nonetheless relevant. The commentary to U.S.S.G. §2D1.1(b)(1) provides an exception to the enhancement if the defendant can show that 'it is clearly improbable that the weapon was connected with the offense.' . . . Thus, the connection between the firearm and the predicate offense is relevant under both the sentencing enhancement and section 924(c); the only difference between U.S.S.G. §2D1.1(b)(1) and section 924(c) is the assignment and standard of the burden of proof regarding this connection. We held in *Brady* that a sentencing judge may not, 'under *any* standard of proof,' rely on facts of which the defendant was acquitted."

U.S. v. Watts, 67 F.3d 790, 796–98 (9th Cir. 1995). *Cf. Bailey v. U.S.*, 116 S. Ct. 501, 506 (1995) ("conviction for 'use' of a firearm under §924(c)(1) requires more than a showing of mere possession").

See *Outline* at I.A.3 and II.C.4.

Departures

Mitigating Circumstances

Second Circuit affirms downward departure in "close case," deferring to district court's "better feel" for the circumstances. Defendant was convicted of 22 counts involving fraudulent conduct against the government. A vice president of Grumman Data Systems Corp., he negotiated a contract with NASA. However, he violated federal contracting law by not truthfully disclosing certain pricing data that led to a significant—and illegal—financial benefit to Grumman. The sentencing judge departed downward by seven levels, partly because the calculated loss "significantly . . . overstate[d] the seriousness of the defendant's conduct." *See* §2F1.1, comment. (n.7(b)). The judge also concluded that there were mitigating circumstances that warranted departure under §5K2.0, namely that "(i) Broderson had sought only to benefit his employer, Grumman, and had received no personal benefit from the fraud; (ii) under existing market conditions, the contract was favorable to the government; and (iii) the government received restitution from Grumman."

Although the appellate court remanded on another sentencing issue, it rejected the government's challenge to the downward departure and concluded that the circumstances here fell "outside the 'heartland' of fraud cases. In addressing that issue, we adopt then-Chief Judge Breyer's analysis in *U.S. v. Rivera*, 994 F.2d 942 (1st Cir. 1993). . . . The departure in the present case can be justified, if at all, only as a 'discouraged departure.' Ordinarily, payment of restitution is not an appropriate basis for downward departure under Section 5K2.0 because it is adequately taken into account by Guidelines Section 3E1.1, dealing with acceptance of responsibility. . . . Nor is lack of personal profit ordinarily a ground for departure, because the Commission generally took that factor into account in drafting the Guidelines. . . . Finally, the fact that the contract was favorable to NASA given existing market conditions arguably does not mitigate Broderson's failure to observe [federal contract] obligations."

"Nevertheless, we also recognize the district court's 'better "feel" for the unique circumstances of the particular case before it,' *Rivera*, 994 F.2d at 951, and 'special competence' in determining whether that case falls within the 'heartland.' *Id.* . . . Judge Mishler concluded that this confluence of circumstances was not taken into account by the Guidelines . . . and that the loss calculation . . . overstated the seriousness of Broderson's offense . . . Although we regard the case as a close one, we believe that Judge Mishler was within his discretion in downwardly departing and that the departure was reasonable. We agree with *Rivera* that courts of appeals should recognize that they hear relatively few Guidelines cases compared to district courts and that district courts thus have a 'special competence' in determining whether a case is outside the 'heartland.' 994 F.2d at 951. Although we might have reached a contrary decision . . . , we acknowledge that there are grounds on which his violation of [these laws] are distinguishable from classic instances of fraud. We thus defer to Judge Mishler's view of the case."

U.S. v. Broderson, 67 F.3d 452, 458–59 (2d Cir. 1995).

See *Outline* at VI.C.3, 5.a, and X.A.1.

Criminal History

Career Offender Provision

First Circuit upholds amendment to definition of "Offense Statutory Maximum." The career offender guideline, §4B1.1, uses a defendant's "Offense Statutory Maximum" sentence for the offense of conviction in determining the applicable offense level. The phrase was first defined in a Nov. 1989 amendment to §4B1.1's commentary as "the maximum term of imprisonment authorized for the offense of conviction that is a crime of violence or controlled substance offense." Some circuits held that the maximum included applicable statutory enhancements that increased the statutory maximum sentence, like those in 21 U.S.C. §841(b)(1). Amendment 506, effective Nov. 1, 1994, changed the definition to specify that the maximum does "not includ[e] any increase in that maximum term under a sentencing enhancement provision that applies because of the defendant's prior criminal record." *See* §4B1.1, comment. (n.2). This amendment was made retroactive under §1B1.10(c).

Ruling in four cases that were consolidated for this appeal, the appellate court upheld the changed definition, concluding that it is a reasonable interpretation of the statute that authorized the career offender guideline, 28 U.S.C. §994(h). That section instructs the Sentencing Commission to "assure that the guidelines specify a sentence to a term of imprisonment at or near the maximum term authorized for [career offenders]." Looking at the language of the statute and the legislative history, the court found "no clear congressional directive regarding the meaning of the term 'maximum' as that term is used in section 994(h)." In such a case, "an interpretation by the agency that administers it will prevail as long as the interpretation is reasonable under the statute. . . . We believe that the Commission's act in defining 'maximum' to refer to the unenhanced maximum term of imprisonment . . . furnishes a reasonable interpretation of section 994(h). The statute explicitly refers to 'categories of defendants,' namely, repeat violent criminals and repeat drug offenders, and does not suggest that each individual offender must receive the highest sentence available against him. The Career Offender Guideline, read through the prism of Amendment 506, adopts an entirely plausible version of the categorical approach that the statute suggests."

In one of the cases on appeal, the district court agreed that the new definition was valid but declined to apply it retroactively to reduce defendant's sentence. The appellate court held that the district court properly acted

within the discretion granted under §1B1.10(a) and 18 U.S.C. §3582(c)(2) in choosing not to reduce the sentence. Another sentence that had been reduced was affirmed, and the two where the district court held that Amendment 506 was invalid were remanded.

U.S. v. LaBonte, 70 F.3d 1396, 1403–12 (1st Cir. 1995) (Stahl, J., dissenting).

See *Outline* at IV.B.3.

Sentencing Procedure

Plea Bargaining

Eighth Circuit holds that district court may not defeat purposes of plea agreement by departing upward based on dismissed charge. Under a plea agreement, defendant pled guilty to both conspiracy to transfer and aiding and abetting the transfer of stolen property in interstate commerce. The parties anticipated the guideline range would be 24–30 months, with a total offense level of 13, and the government agreed to file a §5K1.1 motion. However, they discovered that defendant's guilty plea to conspiracy would lead to a significantly longer sentence because the plea included a stipulation that defendant participated in an armed robbery related to the offense—that would require use of the guideline for armed robbery (level 26) and a guideline range of 70–87 months. Defendant and the government reached a new agreement whereby defendant would withdraw his plea to the conspiracy and the government would dismiss that count at sentencing. The district court followed the parties' calculations in reaching a 24–30 month range, but departed upward under §5K2.0 on the ground that defendant's participation in the armed robbery was relevant conduct that was not adequately reflected in the guideline sentence. The court also departed downward on the government's §5K1.1 motion and, without explaining how it apportioned the two departures, sentenced defendant to 30 months.

The appellate court remanded. "The sentencing court erred in considering conduct from the dismissed count as the basis for an upward departure under section 5K2.0 in clear opposition to the intentions of the parties as embodied in their plea agreement. A contrary rule would allow the sentencing court to eviscerate the plea bargaining process that is vital to the courts' administration. . . . Permitting sentencing courts to accept a defendant's guilty plea and yet disavow the terms of and intent behind the bargain . . . would bring an unacceptable level of instability to the process. Unquestionably, the district courts may consider conduct from uncharged or dismissed counts for certain purposes under the guidelines," such as adjustments and other specific offense characteristics, and for criminal history departures under §4A1.3(e). "The circuit courts are divided, however, on the question of whether conduct from dismissed counts may be used as a basis for an upward departure under section 5K2.0. Although we note that each case implicates a different constellation of variables under the guidelines, our holding is generally consistent with the Third and Ninth Circuits." *See U.S. v. Thomas,* 961 F.2d 1110, 1120–22 (3d Cir. 1992); *U.S. v. Castro-Cervantes,* 927 F.2d 1079, 1082 (9th Cir. 1990). "The court was not entitled to defeat the parties' expectations by imposing a more severe sentence using Harris's role in the armed robbery that preceded the offense of conviction to depart upward pursuant to §5K2.0. For that reason, we remand the case to the district court with instructions either to resentence Harris in a manner consistent with this opinion or to reject the plea agreement and allow Harris the opportunity to withdraw his plea as directed by [Fed. R. Crim. P.] 11(e)(4)."

U.S. v. Harris, 70 F.3d 1001, 1003–04 (8th Cir. 1995).

See *Outline* at IX.A.1.

Violation of Supervised Release

Sixth Circuit holds that court may consider need for drug rehabilitation in setting length of revocation sentence, but may not order defendant to participate in intensive in-prison drug treatment program. Defendant was originally sentenced to three years' probation. His probation was revoked for drug use and he was sentenced to six months' imprisonment, followed by three years of supervised release. His supervised release was revoked under 18 U.S.C. §3583(g) because he possessed cocaine; he had also failed to complete a required drug treatment program. By the time he was sentenced for the revocation, defendant had been jailed for six months, and his recommended sentence under USSG §7B1.4 was only 3–9 months. "The District Court expressed concern that if defendant were sentenced to a term of nine months he would only be incarcerated an additional three months, a period not long enough to insure his completion of a prison drug treatment program." Therefore, because of defendant's extensive history of drug use and drug-related problems, the court "imposed a sentence of sixteen months with the requirement that defendant participate in an intensive drug treatment program while in custody." Defendant appealed the length of sentence and the required treatment.

The appellate court upheld the length of sentence but not the order for treatment. "Unlike the statutory provisions governing initial sentencing and sentencing upon permissive revocation of supervised release, the statutory provisions governing mandatory revocation of supervised release neither instruct nor prohibit the sentencing court from considering rehabilitative goals in determining the length of a sentence upon mandatory revocation of supervised release. [*See* 18 U.S.C. §§3553(a), 3583(e), and 3583(g).] However, we can identify no reason that a court sentencing a defendant upon mandatory revocation of supervised release should not be able to consider rehabilitative goals in arriving at the length of a sentence

while a court imposing either an initial sentence [within the guideline range] or a sentence upon permissive revocation of supervised release may properly consider that need." Therefore, "a district court may properly consider a defendant's rehabilitative needs in setting the length of imprisonment within the range prescribed by statute."

However, the drug treatment requirement was not authorized. "Although statute and federal regulations do not squarely address whether it is within the sentencing court's authority to order a defendant's participation in a drug rehabilitation program, they do indicate that it is solely within the authority of the Federal Bureau of Prisons ('Bureau') to select those prisoners who will be best served by participation in such programs. . . . Therefore, we conclude that it was beyond the District Court's authority to order defendant's participation in a drug treatment program while incarcerated." However, the district court "may recommend that a prisoner receive drug rehabilitation treatment while incarcerated," and on remand it may "amend its order to recommend rather than mandate defendant's participation."

U.S. v. Jackson, 70 F.3d 874, 877–81 (6th Cir. 1995).

See *Outline* at VII.B.1 and 2.

General Application

Sentencing Factors

Ninth Circuit supersedes prior decisions in *Camp*, holds that state-immunized testimony that was not compelled may be used for departure. In a state proceeding unrelated to the instant federal offense, defendants were granted transactional immunity for all offenses relating to a 1979 shooting death. When defendants were later sentenced in federal court, the district court found that defendants' roles in the 1979 death warranted upward departure under §4A1.3. The appellate court originally remanded, holding that defendants' state transactional immunity required there be "an independent, legitimate source" regarding defendants' role in the death before that evidence could be used for federal sentencing. *See U.S. v. Camp*, 58 F.3d 491, 492–93 (9th Cir. 1995). That opinion was later amended, with the court stressing that the grant of immunity must have been initiated by the state so that the self-incriminating information was state-induced. *U.S. v. Camp*, 66 F.3d 185 (9th Cir. 1995), *withdrawn*, 66 F.3d 187 (9th Cir. 1995).

The court has now amended the original opinion to affirm the sentence, holding that "a federal court may consider information revealed by a defendant in exchange for state transactional immunity." The court concluded that the rule of *Murphy v. Waterfront Comm'n*, 378 U.S. 52, 79 (1964), limiting the use of incriminating information given by a state witness, "applies only if the witness [was] compelled to testify. Otherwise, there are no Fifth Amendment implications. . . . It does not appear that the Camps were constrained in any way to accept the state's offer of immunity." They "had the option to remain silent," and "the record does not suggest that any negative consequences would have followed if [they] had invoked the privilege. . . . Absent any Fifth Amendment implications, the Camps' immunity agreement had the same effect as a cooperation agreement. A sentencing judge has discretion to depart upward when the defendant's criminal history category is inadequate because 'for appropriate reasons, such as cooperation . . . [he] had previously received an extremely lenient sentence for a serious offense.' USSG §4A1.3, p.s. An upward departure is similarly appropriate here. Because they were never charged in connection with [the] death, the Camps' criminal history categories do not reflect gravely serious criminal conduct. The court did not err in taking that conduct into account at sentencing."

U.S. v. Camp, No. 94-30292 (9th Cir. Dec. 22, 1995) (Wright, J.).

See *Outline* at I.C and VI.A.1.c.

Note: Readers should delete the entries for *Camp* in the *Outline* at sections I.C (p. 9) and VI.A.1.c (p.148), 7 *GSU* #11 (p.3), and 8 *GSU* #2 (p.4).

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Federal Judicial Center
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, N.E.
Washington, DC 20002-8003